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June 1, 2004

**BY HAND DELIVERY** (AND FACSIMILE)

Mr. Lawrence H. Norton  
Office of the General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: MUR 5440**

Dear Mr. Norton:

On behalf of John Kerry for President, Inc., Senator John Kerry, and Michael Meehan ("Respondents"), this letter is submitted in response to the complaint filed by the Republican National Committee and Bush-Cheney '04, Inc. ("Complainants") and subsequently labeled MUR no. 5440.

For the reasons set forth below, the Federal Election Commission should find no reason to believe that the Respondents have violated the Federal Election Campaign Act of 1971, as amended or the Commission's regulations, and it should dismiss this matter.

The complaint accuses the campaign and the individual respondents of accepting "a prohibited soft money contribution by illegally coordinated their joint media buy" with the Media Fund and Moveon.Org, two entities organized under I.R.C. § 527 (2004) but not registered with the Commission. Complaint at p. 51. To buttress this allegation, the complaint points to three sets of evidentiary support: an allegation of collusion with regard to media buys; a list of former employees, common vendors and individuals who have roles with both the Kerry campaign or a Democratic political committee and an outside organization; and a description of a house party jointly hosted by Moveon.Org and East Bay for Kerry.

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As we explain below, the complaint does not plead facts sufficient to allege a violation of law, and none of the evidence presented supports the allegations of coordination made by the complaint.

## **I. The Media Buy**

The complaint argues that the similar media buys of the Kerry campaign and the two § 527 organizations prove that there was illegal coordination between the three entities. The media buy evidence fails to prove coordination between the organizations for two reasons. First, knowledge of both the targeted media markets and the Bush campaign's media buy were publicly available and widely disseminated. Second, because media buys are made public through the political files of broadcasters, 47 C.F.R. § 73.1943 (2004), and because it was made public where the campaigns and the outside organizations were buying time, the § 527 organizations would have no difficulty placing ads in markets in which the campaign had already bought time, or vice versa.

### **A. The Targeted States & the Bush Media Buy**

There has been widespread agreement about where the political battleground will be in the general election, and which states will be targeted by the presidential campaigns. A search of the Factiva database for news articles written before March 1, 2004 – before either the Complainants or the Respondents began advertising – and including the terms "presidential" or "election" and the phrases "17 states" or "18 states" yields 5,046 documents. These articles describe and name the 17 or 18 states where the presidential election is likely to be close. Many more articles were written when the Bush campaign began its large media buy. On March 4 and 5th alone, a search identical to the one above retrieved another 116 documents, primarily describing the Bush media buy. Between the public agreement as to the targeted states, and the recent and public Bush campaign advertisements, the relevant data was well-known.

### **B. Public Access to Media Buys**

Broadcast stations must "keep and permit public inspection of a complete and orderly record (political file) of all requests for broadcast time made by or on behalf of a candidate for public office." 47 C.F.R. § 73.1943(a). The records required must be placed in the political file "as soon as possible," which means "immediately." *Id.* § 73.1943(c).

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Not only were the § 527 organizations responding to the Bush campaign's media buy, they also could have been responding to the Kerry campaign's media buys. The complaint alleges that the media buys at issue took place over a period of four days, from March 10 to March 13. This period would have allowed plenty of time for the § 527 organizations to monitor the political files and tailor their buys according to the Kerry campaign's purchase of air time. Coordination, as defined by 11 C.F.R. § 109.21, would not have been necessary to achieve even perfect uniformity between the Kerry campaign and the § 527 organizations had that been a desired goal.

## **II. Employees**

The complaint alleges that the Kerry campaign coordinated with various outside organizations either through the employees who have worked at one organization and now work for another,<sup>1</sup> or through consultants<sup>2</sup> or board members<sup>3</sup> who continue to have dual roles with both the Kerry campaign and one or more outside organizations. As is explained below, the complaint does not plead facts sufficient to describe a violation of law, and there was no coordination between the Kerry campaign and outside organizations.

### **A. Former Employees & Vendors**

#### **1. No Allegation of Conveying or Using Information**

When drafting the regulation defining coordinated communications, the Commission explicitly considered the movement of employees from campaigns to outside organizations in a campaign cycle. After considering imposing an absolute prohibition on such movement – at least during a "cooling off period" – the Commission explicitly rejected that position, as it was "unwilling to impose a complete ban on an individual's employment opportunities." Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 438 (Jan. 3, 2003). The

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<sup>1</sup> These individuals include Jim Jordan, Andy Grossman, and Cathy Duvall.

<sup>2</sup> These individuals include Minyon Moore, described in the complaint as a "Kerry campaign consultant." Complaint at p. 59.

<sup>3</sup> These individuals include Bill Richardson, Linda Chavez-Thompson, Harold Schaitberger, and Harold Ickes.

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Commission also refused to prevent campaigns and outside organizations from using common vendors, noting that it "disagrees with those commenters who contended the proposed [common vendor] standard created any 'prohibition' on the use of common vendors, and likewise disagrees with the commenters who suggested it established a presumption of coordination." *Id.* at 436. Instead, the Commission made a clear and explicit decision to permit both the movement of employees from campaigns to outside organizations, and the use of common vendors. These arrangements will only lead to a finding of an in-kind contribution to a campaign if there was the use or conveyance of material information.

There is no allegation that any restricted information was used or conveyed, or that it was material to the creation or distribution of any communication as required by § 109.21(d)(4)(iii) and (5)(ii).<sup>4</sup> The complaint assumes a presumption of coordination, a position considered and rejected by the Commission when the coordination regulations were promulgated. Without any allegations or evidence of specific information that was used or conveyed, there can be no coordination.

In this regard, it is noted that Andy Grossman and Cathy Duvall have never had positions with the Kerry campaign, and they worked only for the party's House and Senate campaign committees this election cycle. Jim Jordan was fired by the Kerry campaign on November 9, 2003, a full four months before the advertisements at issue began.

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<sup>4</sup> In order for a communication to be defined as coordinated due to the actions of these individuals, they must have "use[d] or convey[ed] to the person paying for the communication" the following:

(A) Information about the clearly identified candidate's plans, projects, activities, or needs, or his or her opponent's campaign plans, projects, activities, or needs, or a political party committee's campaign plans, projects, activities, or needs and that information is material to the creation, production, or distribution of the communication; or

(B) Information used [by the individual] in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or an agent of any of the foregoing, and that information is material to the creation, production, or distribution of the communication.

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## **2. Section 109.21(d)(4-5) Does Not Apply to Campaigns**

Even if a former employee or common vendor used or conveyed material information, that alone cannot result in an in-kind contribution being accepted or received by a candidate or political party committee. Section 109.21(b)(2) makes clear that while such coordination may result in an illegal contribution by an outside entity, there must have been either a request or suggestion, material involvement, or a substantial discussion for the campaign to have received an in-kind contribution.

Notwithstanding paragraph (b)(1) of this section, the candidate, authorized committee, or political party committee with whom or which a communication is coordinated does not receive or accept an in-kind contribution, and is not required to report an expenditure, that results from conduct described in paragraphs (d)(4) or (d)(5) of this section, unless the candidate, authorized committee, or political party committee, or an agent of any of the foregoing, engages in conduct described in paragraphs (d)(1) through (d)(3) of this section.

11 C.F.R. § 109.21(b)(2).

The complaint does not allege that any of the former employees or current vendors meet the conduct standards of § 109.21(d)(1) to (3). The complaint focuses only on the information that a former employee or a current vendor might convey from the Kerry campaign to an outside organization. Even if that has occurred, it would not trigger an in-kind contribution that was received by the Kerry campaign. The complaint does not plead sufficient facts to allege that coordination has resulted in an in-kind contribution reportable by the Kerry campaign.

### **B. Concurrent Officers & Board Members**

Other individuals named have positions with the Kerry campaign, the Democratic National Committee, or the Democratic National Convention and also have board or officer positions with outside organizations. These individuals do not fall under the categories defined in § 109.21(d)(4) and (5). Instead, allegations of coordination involving these individuals must allege either a "request or suggestion" by the candidate or an agent, the "material involvement" of the candidate or an agent in the creation or distribution of the communication, or a "substantial discussion" concerning the communication. *Id.* § 109.21(d)(1-3). The allegations must entail either these

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individuals meeting any of the conduct standards in § 109.21(d)(1-3) while serving as agents of the Kerry campaign, or else that other agents of the Kerry campaign met the conduct standards of § 109.21(d)(1-3) in concert with the named individuals, who were serving as agents or representatives of outside organizations.

Agents must have "actual authority" to transmit information or otherwise be involved in the creation, production or distribution of communications for the benefit of the Kerry campaign. *Id.* § 109.3. The complaint does not allege that the named individuals have actual authority to be involved in the communications of the Kerry campaign. Without agent status, these individuals could not meet the conduct requirements of § 109.21(d)(1-3).

Even if the named individuals did meet the definition of "agent," there is no allegation in the complaint that these individuals requested or assented to, were materially involved in, or had a substantial discussion about a communication paid for by an outside organization. The allegations are based solely on the individuals' roles in the Kerry campaign or with a Democratic party committee; without more, such allegations do not describe a coordinated communication.

Moreover, there was in fact no coordination of communications between the named individuals and any outside organizations. Of the individuals named in the complaint, only one, Harold Schaitberger, has a role with the Kerry campaign. Bill Richardson has a role only with the Democratic National Convention. Harold Ickes is one of hundreds of members of the Democratic National Committee. Furthermore, the outside organizations with which Schaitberger, Richardson, and Linda Chavez-Thompson have positions – Voices for Working Families and Moving America Forward – are only mentioned in passing on pages 24-25 of the complaint, and their activities are not described with any specificity.

There is also no allegation that any other agents of the Kerry campaign coordinated communications with the named individuals. For instance, there is no allegation that the Kerry campaign requested to one of the named individuals that an outside organization create a communication. The complaint does not allege that any of the named individuals were involved in substantial discussions with the Kerry campaign regarding outside communications. And in fact, there were no such discussions. Again, the complaint is based purely on the fact that these individuals have a role both in the Kerry campaign, or in a Democratic party committee, and in an outside organization.

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In sum, the complaint does not plead sufficient facts to allege a finding of coordinated communications due to the conduct of the board members named. The complaint alleges neither that these individuals are agents of the Kerry campaign under § 109.3, nor that there was any coordinating conduct as defined in § 109.21(d)(1-3). Without these essential elements, the facts pled are not enough to describe a violation of § 109.21.

### **C. MoveOn.org**

The complaint notes that "Eli Pariser . . . is charge [sic] of both the hard and soft money activities of MoveOn.org." Complaint at p. 61. The allegation appears to be that the Kerry campaign is coordinating with MoveOn PAC, and that information will be passed on to the "soft money activities of MoveOn.org." *Id.* This allegation is premised on the unstated assumption that the Kerry campaign or its agents are coordinating communications with MoveOn PAC. That is incorrect. The Kerry campaign is not coordinating communications with MoveOn PAC, and the PAC has made no in-kind contributions to John Kerry for President.

### **D. Michael Meehan**

Respondent Michael Meehan is on leave from his position at NARAL Pro-Choice America and is currently on the staff of the Kerry campaign. The complaint alleges that Meehan may have taken "with him any of the information he learned about [NARAL's] soft dollar plans (and how could he not)." Complaint at p. 60. There is no actual evidence, nor even a specific allegation, that Meehan has any information regarding NARAL's plans concerning the presidential election. Furthermore, even if he had, no contribution would result. The definition of coordinated communication bars only the flow of information from a campaign or political party committee, to the person paying for the communication at issue. It does not bar the one-way flow of information from an outside organization paying for a communication to the campaign or political party committee. *See* 11 C.F.R. § 109.21(d).

## **III. MoveOn.Org House Party**

The complaint alleges coordination and illegal contributions as a result of an "East Bay for Kerry / MoveOn.org House Party." Complaint at 26. The complaint does not plead any facts regarding which laws or regulations were violated by this event, or how an illegal contribution resulted. The allegations in the complaint relating to this event, even if true, do not constitute a violation of federal election law.

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In fact, no contribution at all resulted from this event. As the complaint and the accompanying evidence indicates, this event was a "house party." It was not a fundraiser. The incidental expenses were exempt from the definition of "contribution" and "expenditure" as the use of a volunteer's real or personal property, and the cost of invitations, food and beverages when provided by a volunteer on his or her residential premises. *See* 11 C.F.R. §§ 100.75, .77, .135, & .137. Moreover, the house party was organized by East Bay for Kerry, an unofficial organization supporting Senator Kerry's candidacy, and not by the Kerry campaign. Finally, this event had no relation to the creation or distribution of any public communication.

#### IV. Conclusion

For the reasons detailed above, John Kerry for President, Inc., Senator Kerry, and Michael Meehan respectfully request that the Commission dismiss the complaint.

Very truly yours,



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Marc Elias  
Counsel to John Kerry for President, Inc.  
Senator John Kerry  
Michael Meehan

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